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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**Finance Docket No. 35504**

**UNION PACIFIC RAILROAD COMPANY – PETITION  
FOR DECLARATORY ORDER**

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ENTERED  
Office of Public Record  
Jan 12 2012  
Part of  
Public Record

**REPLY COMMENTS OF U.S. MAGNESIUM, L.L.C.**

U.S. Magnesium, L.L.C. ("USM"), a Party of Record in this proceeding, hereby submits its Reply Comments pursuant to the Decision issued in this docket on December 12, 2011. As its Opening Comments in this Proceeding, USM adopted the Joint Opening Comments of the Chlorine Institute, the American Chemistry Council, the Fertilizer Institute, and the National Industrial Transportation League. These Reply Comments address several aspects of the opening filings of Union Pacific Railroad Company ("UP") and other railroads in this proceeding. These Reply Comments include the attached Verified Statement of Dr. Howard I. Kaplan of USM ("Kaplan VS").

To reiterate from USM's Opening Comments, USM owns and operates a magnesium production facility located at Rowley, Utah, on the Great Salt Lake. USM is the only remaining producer of primary magnesium in the United States. Chlorine is one of several chemical co-products of the plant's magnesium production, whose primary feedstock is the vast amount of magnesium chloride present in the Great Salt Lake. USM must ship the chlorine produced by its magnesium operations by railroad.

As an initial comment, USM disagrees with the statements made by UP and its Vice President & General Manager – Chemicals, Ms. Diane Duren, concerning the scope and impact of the settlement of the complaint filed by the Chlorine Institute and the American Chemistry Council in Utah Federal District Court in 2009.<sup>1</sup> As Ms. Duren explained at page 7 of her verified statement, USM was the only shipper initially subject to Tariff 6607 when it was first issued. Consequently, USM was involved in the Utah case. Kaplan VS at 2. Dr. Kaplan's recollection of the suit is that had nothing to do with the issues presented by UP's Petition for Declaratory Order in this proceeding, but rather was limited to the specific question of whether UP could, through a tariff, require a rail shipper to indemnify UP for its own negligence. *Id.* In fact, the version of UP Tariff 6607 at issue in that case did not contain the provisions concerning third party liability at issue in this proceeding. In USM's view, therefore, UP's statement that the third party liability provisions in the current version of UP Tariff 6607 "are the product of an agreement that resolved a complaint filed by the Chlorine Institute ("CI") and the American Chemistry Council ("ACC") against UP in a Utah federal court in June, 2009," UP Opening Comments at 2-3, is not true. The third party liability issues that are the focus of this proceeding were simply not at issue in that case or its resolution. Kaplan VS at 2.

USM also takes issue with the statements and inferences made by the Class I railroads in this proceeding that their TIH customers are not responsible or mindful of the risks of transporting TIH commodities. USM treats its production and shipment of chlorine very seriously. In his Verified Statement Dr Kaplan sets out only some of the many measures USM takes within its control to ensure that the loading and transportation of its chlorine is as safe as possible. *Id.* at 3. Of course, like all other TIH shippers, USM cannot control how the Class I

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<sup>1</sup> *The Chlorine Institute, Inc. v. Union Pacific R.R. Co.*, Case 2:09-cv-00574-CW (D.Utah).

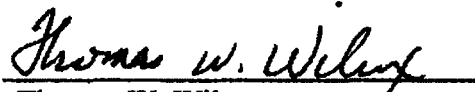
railroads transport or handle its rail cars once they are in the interstate railroad system, or the extent to which third parties or acts of God become involved in such transportation and handling.

USM is also greatly concerned that this proceeding is yet another attempt by UP, with the support of the other Class I railroads, to limit the common carrier obligation to transport chlorine and other TIH commodities, *Id.* at 3-4, (summarizing how USM has direct experience with UP's past efforts to limit its obligation to transport chlorine, starting in 2009 with UP's attempted refusal to provide USM rates and service terms from its Rowley facility to customers in Louisiana and Texas in Finance Docket No. 35219, *Union Pacific Railroad Company – Petition for Declaratory Order*, and continuing with huge rate increases that resulted in USM filing three rate complaint cases with this Board covering a major portion of its movements on UP). The liability provisions in UP's Tariff 6607 at issue in this proceeding appear to be yet another component of an overall strategy to severely restrict, if not eliminate the rail transportation of chlorine and other TIH commodities. The global market for TIH commodities is fluid and unpredictable, and TIH producers like USM therefore must have maximum flexibility to compete in the global market for these products. *Id.* at 4. UP's liability tariff provisions, and similar provisions adopted by the other Class I railroads, will constrict the ability of TIH commodity producers to market their products and compete and ultimately, survive.

Finally, USM supports the Joint Reply Comments of the American Chemistry Council, the Chlorine Institute, the Fertilizer Institute, and the National Industrial Transportation League. In addition to concurring with the Joint Reply Comments' criticisms of the provisions of Tariff 6607 at issue, USM finds it troubling that the real purpose and intent of UP Tariff 6607 appears to be much broader than UP represented in its Petition, and may in fact be for the purpose of obtaining the STB's approval for UP to obtain, by common carrier tariff, broad indemnification

from rail shippers of TIH and other hazardous commodities for liabilities the railroad would have under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") and other statutes. UP's Petition was filed for the express purpose of obtaining "an order that will resolve a controversy regarding UP's ability to protect itself against the risk of catastrophic liability associated with the shipment of toxic inhalation hazardous commodities ("TIH')." Petition at 1. If in fact the purpose and effect of Tariff 6607 are much broader than represented in UP's Petition, this provides additional grounds for the Board to find the tariff provisions at issue to be unreasonable.

Respectfully submitted,

A handwritten signature in cursive script, reading "Thomas W. Wilcox", is written over a horizontal line.

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*Attorney for U.S. Magnesium L.L.C.*

Dated: March 12, 2012

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**VERIFIED STATEMENT OF DR. HOWARD I. KAPLAN**

My name is Dr. Howard I. Kaplan. I am currently employed by U.S. Magnesium, L.L.C. ("USM") as a contractor with the title of Chemical Transportation Consultant for USM's Rowley, Utah production facility located on the shores of the Great Salt Lake, 60 miles from Salt Lake City. The Rowley facility, which has produced magnesium from the magnesium chloride rich waters of the Great Salt Lake since 1972, is the only surviving magnesium producer in North America. I have worked in the magnesium business in Rowley and Salt Lake City since 1981. For 14 years, I was the Vice President of Sales for Magcorp (a predecessor of USM) where I was responsible for all sales of Magnesium Metal and Chemical Co-products (including chlorine) and Chemical By-Products. My current duties for USM include responsibility for all aspects of rail transportation negotiations and railcar sourcing and regulatory compliance.

This verified statement is offered in conjunction with USM's Reply Comments in this docket.

First, I wish to address the statements of Union Pacific Railroad Company ("UP") generally and Ms. Diane Duren, UP's Vice President & General Manager – Chemicals,

specifically, concerning the scope and impact of the settlement of the complaint filed by the Chlorine Institute and the American Chemistry Council in Utah Federal District Court in 2009. As Ms. Duren explained at page 7 of her verified statement, USM was the only shipper initially subject to Tariff 6607. Consequently, USM was involved in the Utah case. My recollection of the suit is that had nothing to do with the issues presented by UP's Petition for Declaratory Order in this proceeding, but rather was limited to the specific question of whether UP could, through a tariff, require a rail shipper to indemnify UP for its own negligence. In fact, the version of UP Tariff 6607 at issue in that case did not contain the provisions concerning third party liability at issue in this proceeding. I therefore do not agree with UP that those provisions in the current version of UP Tariff 6607 "are the product of an agreement that resolved a complaint filed by the Chlorine Institute ("CI") and the American Chemistry Council ("ACC") against UP in a Utah federal court in June, 2009." UP Opening Comments at 2-3. My recollection is that the third party liability issues that are the focus of this proceeding were simply not at issue in that case or its resolution.

Second, I take issue with the statements of the Class I railroads in their opening submissions that assert or infer that their TIH customers are not responsible or mindful of the risks of transporting TIH commodities and that they do not take steps or incur costs to limit the risks of transporting TIH commodities. These statements are incorrect and unfair, and surprising as well considering the close communication between the railroads and their TIH customers on safety-related issues. USM treats its chlorine production and shipments extremely seriously. It has had zero non-accident releases in the past several years, and it has received numerous UP Pinnacle Safety Awards, including for 2011. Just some of the actions USM has taken to ensure the safety of its chlorine rail movements are as follows:

1. USM is upgrading its fleet of chlorine tank cars to the newest specifications demanded by DOT/FRA/AAR (Interim Spec). USM currently has 55 of such cars, and has purchased or leased additional cars that will increase that number to 115 such cars by 2013.
2. USM has enhanced its pre shipment inspection procedures and valve checks to insure container integrity-implementing all Homeland Security regulations and DOT/FRA shipping regulations.
3. USM has implemented Homeland Security required positive handoffs.
4. USM has implemented GPS tracking trials on some of its tank car fleet.
5. USM utilizes standard operating procedures and checklists for doubly inspecting its tank cars prior to shipment; once when loaded and again prior to shipment.
6. USM torque checks for the bolts on all the valves for its chlorine tank cars for each shipment.
7. USM screens and reviews each of its customers to ensure that they are viable and safe to handle chlorine.
8. USM has implemented annual training for all operators handling chlorine and other hazardous material shipments at loading and the release of all rail cars to UP for transport, even though applicable regulations require such training every three years.
9. USM worked with UP and other railroads to expand the routes on which it can use fully loaded interim cars in order to decrease its total amount of cars shipped while moving its fleet toward the most recent standards.

Third, USM is greatly concerned that this proceeding appears to be yet another attempt by UP, with the support of the other Class I railroads, to limit the common carrier obligation to transport chlorine and other TIH commodities. USM has direct experience with UP's past efforts to limit its obligation to transport chlorine. In 2009, UP sought permission from the STB to refuse to provide USM rates and service terms from our Rowley facility to customers in Louisiana and Texas in Finance Docket No. 35219, *Union Pacific Railroad Company – Petition for Declaratory Order*. The Board denied UP's attempt in that proceeding. In USM's experience, UP has also sought to limit its common carrier obligation, and to force USM's

chlorine off of its system through huge rate increases. This action on the part of UP resulted in USM filing three rate reasonableness cases against UP with the Board in 2009 covering a major portion of the movements for which UP had provided common carrier rates to USM. The liability provisions in UP's Tariff 6607 at issue in this proceeding appear to be yet another component of an overall strategy to severely restrict, or even eliminate the rail transportation of chlorine and other TIH shipments. As I have explained in testimony in prior proceedings before the Board in which USM has participated, the global market for TIH commodities is fluid and unpredictable. As such, TIH producers like USM must have maximum flexibility to compete in the global market for these products. The effect of UP's liability tariff provisions, and similar provisions adopted by the other Class I railroads, will be to constrict the ability of TIH commodity producers to market their products and compete and ultimately, survive.



**Verification Page**

I, Dr. Howard I. Kaplan, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to sponsor this testimony.

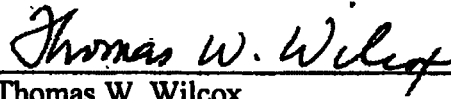
Executed, March 9, 2012

A handwritten signature in cursive script, reading "Howard I. Kaplan", followed by a horizontal line.

Dr. Howard I. Kaplan

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of March, 2012, I served a copy of the foregoing Reply Comments of U.S. Magnesium, L.L.C. ("USM") via email to the following addressees:

  
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